COURT OF APPEALS
DECISION
DATED AND FILED

August 10, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-0770-CR **Cir. Ct. No. 02-CT-1010**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ERIC W. RAYE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Outagamie County: DENNIS C. LUEBKE, Judge. *Affirmed*.

¶1 HOOVER, P.J.[1] Eric Raye appeals a judgment of conviction for operating a motor vehicle with a prohibited blood-alcohol concentration, contrary to WIS. STAT. § 346.63(1)(b), and an order denying his motion for postconviction

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

relief. Raye contends the trial court erred by individually questioning a juror and then sending the jury back to deliberate further after polling revealed the juror dissented from the verdict. This court rejects Raye's arguments and affirms the judgment and order.

Background

¶2 Raye was charged with operating a motor vehicle while intoxicated and operating with a prohibited alcohol concentration, both as third offenses. A jury returned a verdict acquitting him of the OWI but convicting him of the PAC. Raye asked for a jury poll. When asked by the court, "Is this your verdict?" one juror responded, "Can I ask a question?" The court directed the juror to answer the poll before it could address his inquiry. He answered "no" and the court continued polling. The other eleven jurors assented to the verdict.

¶3 Because it did not know the content of the juror's question, the court sent the other eleven jurors out with the bailiff. Ultimately, the court ascertained that the juror had a question about the testimony from one of the State's expert witnesses. The juror stated he would have asked the question before returning the verdict had he known there would be polling. In response to the court's questioning, he indicated that a partial transcript of the witness's testimony would be helpful. The court rejected the jury's verdict, ordered the partial transcript prepared, and indicated the jury would have to resume deliberations.

¶4 Court adjourned for approximately thirty minutes while the transcript was prepared. When the transcript was ready, court reconvened so the State and Raye could verify the document was acceptable to send to the jury. At that point, Raye moved for a mistrial and dismissal because of the non-unanimous verdict. The court denied the motion because it had rejected the first verdict. The

jury deliberated further and returned the same verdict, this time without dissent. Raye filed a postconviction motion to vacate the sentence or, alternatively, for a new trial. The court denied the motion. Raye appeals.

Discussion

¶5 The right to trial by jury protected by the state constitution includes the right to a unanimous verdict in criminal trials.[2] ***State v. Cartagena***, 140 Wis. 2d 59, 61, 409 N.W.2d 386 (Ct. App. 1987). As a corollary, the defendant has the right to poll the jurors individually. ***Id.*** If there is a dissent, or if the juror indicates the assent "is merely an accommodation and against the juror's conscience," it is the court's duty to direct the jury to retire and reconsider its verdict. ***State v. Wiese***, 162 Wis. 2d 507, 518, 469 N.W.2d 908 (Ct. App. 1991).

¶6 The court should interrogate a juror who, during the poll, creates some doubt as to his vote. ***Cartagena***, 140 Wis. 2d at 62. Doubt may result from the juror's demeanor, tone of voice, or language used. ***Id.*** However, the court should first make a determination that the answer was ambiguous or ambivalent before it questions the juror further. ***Id.*** This court accepts the trial court's finding on the issue of assent unless the record shows the trial court foreclosed dissent. ***Id.***

¶7 The issue—the propriety of the interrogation following polling—is waived because Raye failed to make a contemporaneous objection. *See* ***State v. Cydzik***, 60 Wis. 2d 683, 696, 211 N.W.2d 421 (1973) (failure to

[2] A third offense OWI or PAC is a criminal offense. *See* WIS. STAT. §§ 346.65(2)(c) and 939.12.

contemporaneously object to the manner of polling the jury constitutes waiver). Raye claims he did not need to make a contemporaneous objection because the real controversy has not been fully tried and he moved for a mistrial.

¶8 Raye does not identify the "real controversy" nor does he explain how it was not fully tried. Additionally, the mistrial motion was insufficient to preserve the error. The court had completed polling of the jurors, had conducted the juror's interrogation, had ordered the portion of the transcript that the juror needed, and had recessed to conduct other matters in other cases while the transcript was prepared. The proceedings then resumed so the parties could review the transcript before sending it to the jury. Only at that late stage did Raye seek a mistrial and dismissal.

¶9 Even on their merits, however, Raye's arguments fail. Raye contends the court should have immediately sent the jury back to deliberate, without interrogation, because he believes the juror's dissent was clear. This court disagrees. Although the court did not make an explicit finding, it is evident from the record that the court considered the juror's answer ambiguous and therefore undertook to clarify the problem with its questioning. The only unequivocal "no" came when the juror was directed to answer the court's initial poll. Indeed, the juror indicated in the subsequent questioning that he was not certain what the court meant when it asked whether he really went along with the verdict. Thus, it was appropriate for the court to question the juror's vote and necessary for it to interrogate the juror to ascertain the reason for his dissent and confusion before directing the jury to deliberate further.

¶10 Raye contends that interrogating the juror alone placed unfair pressure on him to conform to the verdict, subjected him to the wrath of the eleven

waiting jurors, and allowed the eleven jurors to deliberate in his absence. The record fails to support these assertions. First, the court took care at the beginning of its interrogation to explain to the juror that neither the court's questions nor any questions counsel might ask should be considered as pressure to change his verdict. It repeated this information twice and assured the juror he was free to vote his conscience. Second, Raye presents no evidence to show that other jurors were annoyed by the juror or that he "had no choice but to contemplate the ire of his fellow jurors." Finally, there is nothing to indicate the other jurors deliberated without him. Indeed, there is no reason why the eleven jurors should have suspected they would be asked to deliberate further.

¶11 Finally, Raye contends the court erroneously informed the juror that a compromise verdict would be accepted.[3] He bases this argument on the following:

> THE COURT: You know, if you are just giving us an explanation that would suggest that you were ultimately convinced to vote this way by the facts and the argument of other jurors, then that's acceptable and we would accept this as your verdict, maybe as a result of compromise or some other considerations, but if you are saying that it really is not your verdict, I need to know that.
>
> JUROR []: It was my verdict on a compromise, I could say it that way.
>
> THE COURT: You ultimately listened to the other jurors, were convinced and persuaded by their argument and changed your vote based upon that collective analysis of the evidence, is that what you are telling us?

[3] Raye suggests the jury should have been given a unanimity instruction. It was, when it was initially instructed. He cites no authority for the proposition that the jurors are to be reinstructed when deliberations are ordered continued. In any event, Raye failed to request the jurors be reinstructed, which waives his objection. *See* ***State v. Glenn***, 199 Wis. 2d 575, 589, 545 N.W.2d 230 (1996).

> JUROR []: Not really.
>
> THE COURT: Not really. Okay. Then I would have difficulty accepting this verdict.

¶12 The court was not issuing jury instructions. By mentioning "compromise or some other considerations" the court evidently meant to inform the juror that it was acceptable if, during deliberations, he had changed his mind based on the evidence or other persuasive reasoning from his fellow jurors. However, even if the trial court meant a compromise in the sense of simple acquiescence, perhaps just so the jury could be dismissed, the court *rejected* the verdict once the juror indicated it was not based on the evidence or argument. Even if the court misspoke, its actions would have suggested that compromise for compromise's sake would not be an appropriate basis for a guilty verdict.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.